Supreme Court,
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In the
Supreme Court of the United States

OCTOBER TERM, 1997

HOLSUM BAKERS OF PUERTO RICO, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

1. Did the Court of Appeals err when it implicitly ruled that the alleged discriminatee did not lose his right to protection under the National Labor Relations Act, or at least his right to the general remedy of reinstatement, after he engaged in egregious, hostile conduct harmful to consumer confidence and threatening to public health and safety which was specifically found to be unprotected?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties and attorneys involved in the proceedings in the Court of Appeals for the District of Columbia Circuit are Holsum Bakers of Puerto Rico, Inc. (now a division of Seaboard Corporation), the Petitioner, and the National Labor Relations Board, the Respondent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW.....ii

TABLE OF CONTENTS.....iii

INDEX TO APPENDICES.....iv

TABLE OF AUTHORITIES.....v

OPINION BELOW.....1

STATEMENT OF JURISDICTION.....1

STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....4

A. Reasons for Granting Petitioner's Writ.....4

B. Factual Background.....5

ARGUMENT.....8

CONCLUSION.....14

INDEX TO APPENDICES

		Page
APPENDIX A	Opinion of the District of Columbia Circuit Court of Appeals	A-1
APPENDIX B	Mandate	A-11
APPENDIX C	Order Denying Rehearing	A-17

TABLE OF AUTHORITIES

Page

Statutes:

18 U.S.C. § 1365 (1984).....10

Cases:

Diamond Walnut Growers, Inc. v. NLRB, No. 95-1075, ____F.3d____, 155 LRRM 2257 (D.C. Cir. May 20, 1997).....11

George A. Hormel & Co. v. NLRB, 962 F.2d 1061 (D.C. Cir. 1992).....9

Local 707, Motor Freight Drivers, 196 N.L.R.B. 613 (1972).....9

Mackay Radio, 96 N.L.R.B. 740 (1951).....9

NLRB v. Electrical Workers (Jefferson Standard Broadcasting), 346 U.S. 464 (1953).....8,9

Rapid Armored Truck Corp., 281 N.L.R.B. 371 (1986).....10

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OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, which is unpublished, appears in the Appendix at A-1.

STATEMENT OF JURISDICTION

The Court of Appeals for the District of Columbia Circuit entered its opinion and judgment on January 10, 1997. On February 21, 1997, the Petitioner timely

filed a Petition for Rehearing, which the District of Columbia Circuit denied on March 10, 1997. Petitioner filed its Petition for Writ of Certiorari within ninety (90) days of the notice of Entry of Judgment denying the Petition for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Court of Appeals for the District of Columbia Circuit had jurisdiction to hear Petitioner's Petition for Review of the decision of the National Labor Relations Board pursuant to Section 10(f) of the National Labor Relations Act as amended, 29 U.S.C. §160(f), which provides in pertinent part as follows:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, *or in the United States Court of Appeals for the District of Columbia,* by filing in such a court a written petition praying that the order of the Board be modified or set aside.

29 U.S.C. §160(f)(1973)(emphasis added).

STATUTORY PROVISIONS INVOLVED

The text of the pertinent statutory provisions is set forth below:.

29 U.S.C. § 158

Unfair labor practices

(a) Unfair labor practices for an employer

It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the

employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

STATEMENT OF THE CASE

A. *Reasons for Granting Petitioner's Writ*

The decision of the United States Court of Appeals for the District of Columbia Circuit, as well as the National Labor Relations Board, disregards the inherent danger in reinstating a former employee, a baker, who has engaged in unprotected conduct, as previously held by this Court, the Court of Appeals, and the Board, and whose reinstatement threatens other employees, the employer, and the public at large. The ripeness of this issue for review is illustrated by the recent 6-4 *en banc* decision of the District of Columbia Circuit in *Diamond Walnut Growers, Inc. v. NLRB,* No. 95-1075, ____F.3d____, 155 LRRM 2257 (D.C. Cir. May 20, 1997). The decision of the Appellate Court and the Board in *Holsum* extends the protection of the Act to conduct which both concede is not protected. That extraordinary ruling relies first upon a stipulation to anti-union animus by the Petitioner as the basis of the General Counsel's asserted prima facie case. That stipulation by its specific terms is unrelated to the charging party's claim. Second, the ruling surprisingly treats the passage of time as a catalyst for changing the legally recognized effect of the charging party's conduct from unprotected conduct to protected conduct.

The Board and the Court of Appeals discredited the denial by the charging party that he repeatedly made

egregiously debasing statements about the company's bakery products. This false testimony concering *the critical fact* of the case should not have been ignored by the Board and the Appellate Court. The charging party made the statements, and he lied in denying that conduct. The case law and the decisions of both the Board and the Court of Appeals herein hold that his conduct is not protected and is a legitimate basis for discharge.

The former employee is *not* the only one with rights in this instance. The Petitioner has rights, the other employees have rights, the shareholders have rights, and the general public has rights — and they are deprived of those rights by the instant decision.

B. *Factual Background*

Holsum Bakers of Puerto Rico, Inc. ("Holsum") is engaged in the manufacture and sale of bread and other consumer bakery products. On September 23, 1993, Holsum's employees voted in a National Labor Relations Board ("the Board") election to determine whether they wished to be represented by Congreso de Uniones Industriales de Puerto Rico ("the Union"). The election result as recorded on the Tally of Ballots was: 251 opposed to union representation and 118 in favor of union representation, with forty-five challenges. The Union filed objections.

On October 14, 1993, Holsum issued a disciplinary warning to Carmelo Rivera ("Rivera"), a production employee in the bakery. On December 13, 1993, the Union filed an unfair labor practice charge alleging that the warning was a violation of Sections 8(a)(1) and (3) of the Act. About one year later, on September 29, 1994, Rivera was discharged, and

the Union filed a charge on October 3, 1994, again alleging violations of 8(a)(1) and (3).

The unfair labor practice charges and objections were consolidated for hearing and heard before an Administrative Law Judge (the "ALJ"). On September 14, 1995, the ALJ issued a decision recommending the dismissal of the objections. Unfair labor practices were found in both Holsum's October 14, 1993 warning and its discharge of Rivera a year later on September 29, 1994. Holsum timely filed exceptions, and on February 12, 1996, the Board affirmed the ALJ's findings in all respects.

The District of Columbia Circuit overruled the Board with respect to the disciplinary warning, but affirmed the Board with respect to the discharge finding. Respondent timely filed a Petition for Rehearing, which was denied on March 10, 1997. The following is a summary of the critical facts from the record.

On August 12, 1993, Rivera received a warning for using obscene language and for defaming and denigrating Holsum's supervisors. Approximately two months later, on October 14, just after the election, Holsum issued Rivera another warning for abusive conduct. Specifically, Rivera blew up at his foreman and accused management of wanting to take his money in an angry and menacing tone. Although the Board found this particular warning to be discriminatory, the Court of Appeals overruled that finding concluding that there was an absence of substantial evidence in the record indicating a discrimatory motivation for the warning. The Court of Appeals specifically referred to the August warning for similar conduct as an indication of Holsum's consistency in administering discipline.

Holsum issued Rivera another written warning in June of 1994, after he verbally attacked and insulted a female employee, causing her to cry. Later in the summer, Mr. Julio Vigoreaux ("Vigoreaux"), Vice President of Manufacturing Operations for Holsum, was told that Rivera was making serious derogatory statements regarding the quality, health, and safety of consuming Holsum's baked goods. Specifically, Rivera stated that Holsum's products are "porqueria"—not fit for pigs—filth—unsanitary, and that he would not let his family eat them. Given the nature, and the tenor of the comments about Holsum's products, Vigoreaux began an investigation to (1) ensure the safety of the products and (2) determine if the allegations regarding Rivera's product-related statements were true.

Holsum's investigation revealed evidence from six employees that Rivera not only had disparaged and attacked the company's products but also that he had gone much further by adding that the products were *poison* and "*porqueria.*" Rivera was interviewed along with the other employees in the department.

In his testimony before the Administrative Law Judge, Rivera denied that he had made *any* negative statements about the company's products. However, *the ALJ and the Board discredited his testimony.*

Following the investigation, the company reviewed Rivera's entire disciplinary record. Based on a clear pattern *for over a year* of hostile, contemptuous, and irrational misconduct and the disparaging and malicious statements he made about product contamination, Holsum decided to discharge him. No other employee has ever made such threatening and derogatory statements about the company's product.

ARGUMENT

The facts as found by the Board itself establish without question that Rivera was a hostile, disgruntled, contemptuous, and at times abusive, employee who disparaged his employer's product by labeling it filthy, unsanitary, and even poison. Rivera's statements were not only potentially devastating to Holsum's business, but also posed a threat to the general public. In light of Rivera's established pattern for angry and irrational behavior going back to August of 1993, his comments also suggested the strong possibility that he might tamper with Holsum's product as a way of acting on his hostility toward Holsum. Rivera's conduct also must be analyzed in light of the Board's specific finding that his own testimony under oath was *not credible.*

In spite of the established facts and serious implications of Rivera's conduct, which was found to be unprotected, the Board and the Circuit Court ordered that Holsum reinstate Rivera with back pay, because he mentioned the Union during the same time frame he made the disparaging comments, and because he made them some nine or ten months before his discharge. This result is contrary to the existing legal limitations on protected activity and represents a serious threat to the public and the interests of justice. It also holds that unprotected conduct can be treated as protected simply by the passage of time.

The right of employees to engage in concerted activity is not an unlimited one. One category of concerted activity, recognized by this Court, which falls outside of the Act's protections has been referred to as disloyalty. In *NLRB v. Electrical Workers (Jefferson Standard Broadcasting)*, 346 U.S.

464, 472 (1953), this Court stated that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer." In *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1066 (D.C. Cir. 1992), the court below cited this principle from *Jefferson Standard Broadcasting* in finding that an employee lost the protection of the Act by participating in a rally advocating the boycott of his employer's products. Under *Hormel*, disloyal conduct is unprotected regardless of whether the conduct otherwise constitutes concerted activity.

Under the *Jefferson Standard* and *Hormel* line of cases, an employer is justified in disciplining an employee for disloyal conduct, even when such conduct occurs within the course of concerted activity. Another line of cases holds that certain conduct can lead to a forfeiture by employees of protection under the Act such that they may no longer seek the Act's protection. In *MacKay Radio*, 96 N.L.R.B. 740 (1951), the Board found that a strike called to compel the employer to accept unlawful contract provisions was itself illegal, and that the employees who participated in that strike had "forfeited their right to the protection of the Act." The Board further found that the participating employees could not claim the protection of Section 8(a)(3), even though the employer was not motivated by their unlawful conduct in taking adverse employment action against them. 96 N.L.R.B. at 743.

Similarly, in *Local 707, Motor Freight Drivers*, 196 N.L.R.B. 613 (1972), the Board barred unfair labor practice charges by strikers who had participated in unlawful picketing, reasoning as follows:

> [W]here the activity engaged in by the employee is . . . an activity which contravenes the policies of the Act, the **employee has forfeited his right to invoke other provisions of the same statute to restore him to his job with back pay.**

Id. at 614 (emphasis added); *see also Rapid Armored Truck Corp.*, 281 N.L.R.B. 371, 382 (1986). These cases all stand for the proposition that an employee who engages in egregious wrongdoing should not be afforded protection under the Act.

The established facts concerning Rivera's conduct cry out for treatment requiring forfeiture under the reasoning just discussed. Rivera's conduct goes well beyond the disloyalty which merely renders concerted activity unprotected under existing jurisprudence. The seriousness of falsely communicating product contamination is evidenced in the United States Code at Title 18 U.S.C. §1365, the Federal Anti-Tampering Act, which *criminalizes* such conduct, providing in pertinent part as follows:

> (c)(1) Whoever knowingly communicates false information that a consumer product has been tainted, if such product or the results of such communication affect interstate or foreign commerce, and if such tainting, had it occurred, would create a risk of death or bodily injury to another person, shall be fined not more than $25,000 or imprisioned not more than five years, or both.

This statute clearly conveys a public policy and purpose to preserve consumer confidence in the food distribution chain,

as well as in other products with which consumers have contact. In short, the statute recognizes the impact on the general public of contamination communications like those made by Rivera. Rivera's conduct, which can be viewed as criminal under the statute, at a minimum created a threat to consumer confidence in Holsum's products, and this conduct should disqualify him from any right to protection, especially reinstatement, under the National Labor Relations Act.

Aside from the nonprotection this Court and others have accorded such statements, there is a deeper and more serious threat arising from Rivera's behavior—that is, the legitimate and reasonable fear by Petitioner of Rivera's *actual* involvement in contamination of the product, given his consistent pattern for over a year of angry, hostile, contemptuous, and irrational conduct. The Board's discrediting of Rivera's sworn testimony establishes that he cannot be trusted in a position which is public safety sensitive. In *Diamond Walnut Growers, Inc. v. NLRB*, No. 95-1075, ____F.3d____, 155 LRRM 2257 (D.C. Cir. May 20, 1997)(*en banc*), the District of Columbia Circuit has just held that an employer was justified in placing a returning striker into a lower paying position based in part on her involvement in a strike which included a campaign attacking the employer's product. *Id.* at 2263. Notwithstanding the worker's engagement in protected activity when the disparagement occurred, in contrast to Rivera's *unprotected* activity in the instant case, the Court recognized that "when a union claims that a food product produced by a struck company is actually tainted it can be thought to be using the equivalent of a nuclear bomb; the unpleasant effects will long survive the battle." *Id.* Moreover, the Court recognized as reasonable the fear that employees who exhibit such hostility to the employer might take action against the employer once back inside the facility in sensitive positions.

The Court did not enforce the Board's order that a food production employee be reinstated into the position of quality control assistant—a sensitive position similar to that of a baker.

The 6-4 *en banc* decision in *Diamond Walnut Growers* strongly supports Holsum's contention that this issue is far from settled and cries out to be heard before this Court. In light of this very recent decision, Holsum's actions seem even more justified given the Board's finding that Rivera's disparagement of the company's product was *not protected activity*. Considering the potential threat to the public from Rivera's employment as a baker, given his continuing pattern of misconduct, it is simply contrary to the interest of justice to recognize Rivera's right to reinstatement.

The Act does not clothe Rivera with an impenetrable suit of armor at the expense of the public's interest nor does the Act bestow rights which are superior to every right of the employer, the employees, and the shareholder owners of the company. Rather, as with all rights, Rivera's rights must be balanced against the interest of the general public and the rights of others. In this case, his conduct threatened the public's interest in both the actual and the perceived safety of the food distribution system. It threatened the employees' livelihood. His virulent, false disparagement of the company's food products reveals a hostility given vent recklessly. His untruthful disparagement of the company's food products and his untruthful denials in his sworn testimony, as found by both the Board and the court below, prove an absence of trustworthiness. The repetitive nature of his misconduct continuing over more than a year demonstrates that it is of lasting duration.

To let the Board's remedy of reinstatement stand creates unreasonable risk to the public; to the reasonable property rights of the company; and to the job security, and possibly the physical security, of the other workers in the plant. The result of recognizing Rivera's right to reinstatement presents a continuous threat to these interests. The Court of Appeals erred in not weighing this balance of favor of the public, and finding that Rivera lost his right to protection under the Act, or at least his right to reinstatement thereunder.

CONCLUSION

To the extent the Court of Appeals for the District of Columbia Circuit found that Petitioner committed an unfair labor practice by discharging Rivera, Petitioner respectfully requests that the Court's decision be reversed. The Court erred by not finding that Rivera lost his right to the Act's protections, including reinstatement, by engaging in egregious conduct both harmful to the public's confidence in the food distribution system and potentially threatening to public health and safety.

At the least, this case should be remanded to the lower court to reconsider its decision in light of its very recent ruling in *Diamond Walnut Growers, Inc. v. NLRB, supra.*

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-1065 **September Term, 1996**

HOLSUM BAKERS OF PUERTO RICO, INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

United States Court of Appeals For the District of Columbia Circuit

FILED JAN 10 1997

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before EDWARDS, *CHIEF JUDGE,* SILBERMAN, *Circuit Judge,* and BUCKLEY, *Senior Circuit Judge*

J U D G M E N T

This case was considered on the record from the National Labor Relations Board and on the briefs and oral arguments of counsel. After full review of the case, the court is satisfied that appropriate disposition does not warrant an opinion. *See* D.C. Cir. R. 36(b). Accordingly, for the reasons stated in the accompanying memorandum, it is

ORDERED AND ADJUDGED that the petition for review and cross-application for enforcement herein are granted in part and denied in part.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D. C. Cir. Rule 41.

PER CURIAM

For the Court:
MARK J. LANGER,
Clerk

By: /s/ Eva Brown
Deputy Clerk

Attachment

MEMORANDUM

Holsum Bakers of Puerto Rico, Inc. petitions for review of the National Labor Relations Board's determination that it engaged in an unfair labor practice in violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1) and (a)(3), when, on October 14, 1993, it issued a final warning to its employee Carmelo Rivera-Rodiguez ("Rivera") and again when, on September 29, 1994, it discharged him. We grant Holsum's petition for review with respect to the October 14, 1993, final warning but deny the petition insofar as it relates to the September 29, 1994, discharge.

Rivera was employed by Holsum for twenty years as a general helper in its production department. During the summer of 1993, Rivera distributed and collected union authorization cards, encouraged employees to join the Congreso de Uniones Industriales de Puerto Rico ("the Union"), and appeared on five or six union-sponsored radio programs. On September 23, 1993, he participated as a union observer at a union representation election, which the Union lost. The events relevant to this petition for review occurred during the twelve months following the election.

Sections 8(a)(1) and (a)(3) of the Act provide, in relevant part, that "[i]t shall be an unfair labor practice for an employer" to interfere with an employee's collective bargaining rights under the Act, 29 U.S.C. § 158(a)(1), or to discriminate "in regard to hir[ing] or tenure of employment...[in order] to encourage or discourage membership in any labor organization." *Id.* § 158(a)(3). To establish that an employer has committed an unfair labor practice in viola-

tion of these sections, the NLRB General Counsel must make a *prima facie* showing sufficient to support the inference that the employee's participation in protected conduct was a "motivating factor" in the employer's adverse action. Once the General Counsel makes that showing, the burden shifts to the employer to demonstrate that the action would have taken place even in the absence of the protected conduct. *See Passaic Daily News v. NLRB,* 736 F.2d 1543, 1552-53 (D.C. Cir. 1984)(citing *Wright Line,* 251 N.L.R.B. 1083, 1089 (1980)). We will not disturb the Board's findings of fact when they are supported by substantial evidence based upon the record as a whole. *Teamsters Local Union No. 171 v. NLRB,* 863 F.2d 946, 952 (D.C. Cir. 1988)(citations omitted).

Because, in this case, Holsum stipulated that it harbored an anti-union animus, *Holsum Bakers of Puerto Rico, Inc.,* 320 N.L.R.B. 834, 834 (1996), we need only determine whether there was sufficient evidence in the record to support the Board's findings that in each instance, the reasons given by Holsum for its disciplinary actions against Rivera were pretextual.

I. OCTOBER 14, 1993, FINAL WARNING TO RIVERA

On October 6, 1993, approximately two weeks after the election, Rivera refused to accept his paycheck from one member of management. In the lunchroom the next day, he berated his foreman in an abusive manner for not giving him the check. Eight days later, and one day after a picture of Rivera and representatives of the Union appeared in a Puerto Rican newspaper of wide distribution, Holsum issued him a "final warning" for engaging in "improper, unacceptable and clearly provocative behavior aimed at disrupting institu-

tional peace and order." Holsum/Seaboard Bakeries Personnel Action re: Carmelo Rivera Rodriguez, dated 10/14/93, *reprinted in* Appendix at 399. According to Holsum, during the week between the October 6, 1993, incident and the final warning, it followed its unual practice of conducting an investigation of the matter, which included interveiwing witnesses, documenting the interviews, and having supervisors record their own recollections.

The Board concluded that the October 14, 1993, final warning was an unfair labor practice. It reasoned, inter alia, that Holsum's justification for the disciplinary action was pretextual because the warning was issued just one day after the picture of Rivera and the Union representatives appeared in the newspaper while the incident that allegedly gave rise to the action had occurred more than a week earlier. *Holsum*, 320 N.L.R.B. at 838. We find that the Board's inference of an anti-union motivation lacks substantial support in the record. Although the timing of the action could have established a *prima facie* case, Holsum overcame the adverse inference by adequately explaining the delay in the issuance of the final warning. Specifically, it was able to document a practice of investigation and verification of charges of employee misconduct that readily explained the eight-day interval between the offense and the issuance of the warning. Moreover, the disciplinary action in this case was proportional to the level of Rivera's misconduct and consistent with his prior disciplinary record. Two months earlier, on August 12, 1993, Rivera had received a final warning for using obscene language and defaming and denigrating the company's supervisors.

Finally, it strikes us as highly unlikely that the publica-

tion of the photograph would have caused Holsum to take disciplinary action against Rivera. At the time it was published, Holsum was thoroughly aware of Rivera's pro-union activities. The caption under the picture did not mention Holsum; it did not identify Rivera as an employee of Holsum or as a member of the Union; rather, it merely identified him as a "guest" at a party celebrating a settlement agreement with an unrelated company.

II. SEPTEMBER 29, 1994, DISCHARGE

On September 29, 1994, Rivera was called to a meeting with three members of Holsum's management and read a final termination notice. The notice stated that he was being discharged because of his "defamatory, insulting and false remarks" about Holsum's products. This was a reference to statements Rivera had made to fellow employees to the effect that those products were "poisonous"; that he would not give them to his family; and that "not even pigs will eat them."

According to Holsum, it first learned of these statements in August 1994 when one of its employees, Teresa Perez, advised its vice president for manufacturing, Julio E. Vigoreaux, that Rivera had made derogatory comments about the bakery's products. The company insists that it had immediately launched an investigation into the matter, which included the taking of affidavits from employees who had heard Rivera make the remarks; and that with this confirmation in hand, it proceeded to discharge him. On the basis of evidence presented to an administrative law judge ("ALJ"), however, the Board concluded that Holsum's stated reason for discharging Rivera was pretextual and that Rivera had

actually been terminated because he was contemplating a renewed attempt to unionize the company.

That conclusion was based on the following findings of fact: In December 1993 or January 1994, Holsum learned that Rivera had charged that its products were poisonous and were unfit for his family or even for pigs. Seven or eight months later, in August 1994, Perez reported to the company that Rivera had described its products as unfit for both his family and pigs, but did not state that he had described them as poisonous; at the same time, she advised management that Rivera was considering the possibility of another union campaign. The Board noted that it was only then that Holsum launched the investigation that led to Rivera's dismissal. It reasoned that because the company had failed to take any disciplinary action following the earlier report that Rivera had made the more serious charge that its products were poisonous, it was the possibility of renewed union action, not Rivera's disparaging comments, that led Holsum to discharge him. *Holsum Bakers,* 320 N.L.R.B. at 834-37.

Whether Holsum's stated reason for discharging Rivera was pretextual turns on one basic question of fact: When did Holsum first learn that Rivera had described its products as poisonous? Holsum insists that it did not learn of these remarks until August 1994. The Board, however, maintains that Holsum had been advised of them no later than December 1993 or January 1994.

The relevant testimony was given by three employees: Carlos Hernandez, Mayra Rivera-Cabeza, and Perez. Hernandez testified that after the election, Rivera had repeatedly stated that he would not give Holsum products to his family

"because they had poison." Hearing Transcript ("Tr.") at 206. When asked on cross-examination if he remembered when the election was held, Hernandez said that he thought it was around June or July of 1994. Tr. at 210-11. The election, however, actually took place on September 23, 1993. Hernandez further testified that he reported Rivera's comments to his supervisors "as soon as" he first heard them. Tr. at 211-12. On re-direct examination, Hernandez asserted that the conversations he had with Rivera occurred around November 1994 (i.e., over a year after the election) or "perhaps before." Tr. at 217-18. Hernandez then testified that the negative comments were made "[i]n '94 when the elections were held, during the elections." Tr. at 218. Because of this confused testimony, the ALJ requested a copy of Hernandez's affidavit. The affidavit, which was sworn to on November 30, 1994, states, in part:

> [Rivera] would speak to me about a union he wanted to bring to the company. The union lost. I had to pass by him as part of my work and he would make negative remarks about the products. He would tell me that he did not buy the products, he would not give them to to [sic] his family, not even his grandchildren, because they had poison and they would poison them.... He made that remark to me approximately six times.... The first time he said that to me was between June and July of this year.

Affidavit of Carlos Manuel Hernandez, *reprinted in* Appendix at 439 (marginalia corrections included). The affidavit also states that Hernandez reported Rivera's statements to his immediate supervisor, Angel T. Santiago, and to Jose Sanchez of Quality Control. *Id.* at 440.

Rivera-Cabeza testified that she heard Rivera state that "that type of product could not even be given to pigs. And that anyone who were to eat that product could possibly [sic] him/herself." Tr. at 198. She claimed that Rivera began making these comments "after the elections were lost" in December 1993 to January 1994. Tr. at 200. Unlike Hernandez, Rivera-Cabeza did not report them to management.

Perez testified that on or about August 22, 1994, she told Vigoreaux that, during the prior month, Rivera had stated that he would not give Holsum products to his family, that they "were garbage, and that even the pigs did not eat them," Tr. at 222; and that Rivera was talking about the possibility of another union campaign. Tr. at 161. Perez did not testify that Rivera had described the food as poisonous.

Based on the testimony of these three witnesses, the Board determined that Holsum was aware of Rivera's "poison" comments as early as December 1993. *Holsum Bakers,* 320 N.L.R.B. at 837. Although the Board accepted Perez's testimony that Rivera made additional negative comments about the products in July 1994, it concluded that the investigation of those comments and the subsequent discharge occurred because of her report that Rivera was discussing the possibility of another union campaign. *Id.*

We find that there was sufficient evidence to support the Board's conclusion. Although Hernandez was confused as to dates, his testimony was consistent with regard to two essential points: Rivera had charged that Holsum's products contained poison shortly after the election, and Hernandez had reported them to management as soon as he had heard them. Moreover, Hernandez's testimony linking Rivera's out-

bursts with the election was corroborated by Rivera-Cabeza and not contradicted by Perez, who merely discussed additional, somewhat milder comments that Rivera had made at a later date.

III. CONCLUSION

For the foregoing reasons, we find that there is sufficient evidence in the record to support the Board's conclusion that Rivera's discharge constituted an unfair labor practice; but we can find no such evidence to support the Board's determination that Rivera's October 14, 1993, final warning was an unfair labor practice. According, the petition for review is granted in part and denied in part.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOLSUM BAKERS OF PUERTO RICO, INC. Petitioner,	)	U. S. Court of Appeals For the District of Columbia Circuit
v.	)	MANDATE issued 3-26-97
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	FILED JAN 10 1997 No. 96-1065

JUDGMENT

Before: EDWARDS, Chief Judge, SILBERMAN, Circuit Judge, and BUCKLEY, Senior Circuit Judge

THIS CAUSE came on to be heard upon a petition filed by Holsum Bakers of Puerto Rico, Inc., to review an order of the National Labor Relations Board in Board Case Nos. 24-CA-6859, 24-CA-7041, and 24-RC-7575, issued on February 12, 1996, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on November 13, 1996, and has considered the briefs and transcript of record filed in this cause. On January 10, 1997, the Court being fully advised in the premises, handed down its decision enforcing in part, and denying in part an Order of the Board. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Holsum Bakers of Puerto Rico, Inc., Toa Baja, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against any employee for supporting Congresso de Uniones Industriales de Puerto Rico or any other union.

(b) in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed t[illegible]m by Section 7 of the National Labor Relations Act ("the Act").

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Carmelo Rivera-Rodriguez immediate and full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the administrative law judge's decision.

(b) Remove any reference to the unlawful discharge of Carmelo Rivera-Rodriguez from its files and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(d) Post at its facility in Toa Baja, Puerto Rico, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 24 of the National Labor Relations Board (Toa Baja, Puerto Rico), after being signed by the Petitioner's authorized representative, shall be posted by the Petitioner in both English and Spanish, immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply.

IT IS FURTHER ORDERED that each party shall bear its own costs.

/s/ Harry T. Edwards

Chief Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ L.H. Silberman

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ James Buckley

Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives emplyees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice.
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, or otherwise discriminate against any of you for supporting Congresso de Uniones Industriales de Puerto Rico or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Carmelo Rivera-Rodriguez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges

previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed any reference to his discharge from our files and that the discharge will not be used against him in any way.

HOLSUM BAKERS OF PUERTO RICO, INC.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

NO. 96-1065 **SEPTEMBER TERM, 1996**

Holsum Bakers of Puerto Rico, Inc.,
Petitioner

v.

National Labor Relations Board,
Respondent

FILED
MAR 10 1997

BEFORE: Edwards, Chief Judge, Siberman, Circuit Judge, and Buckley, Senior Circuit Judge

O R D E R

Upon consideration of petitioner's petition for rehearing filed February 21, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk